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William S Parks
Milliken & Company
P O Box 1927 (M-495)
920 Milliken Road
Spartanburg, SC 29304

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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*Ex parte* SHULONG LI

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Appeal 2009-010341
Application 09/557,643
Technology Center 1700

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Before CHUNG K. PAK, CAROL A. SPIEGEL, and JEFFREY T. SMITH, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge.*

## DECISION ON APPEAL[1]

## STATEMENT OF THE CASE

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[1] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

The Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-17, all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

*The Invention*

Appellants' invention relates to a side curtain air bag cushion. Claim 1 is illustrative:

1. A side curtain airbag cushion designed to protect vehicle occupants during a rollover collision, said cushion comprising a fabric exhibiting an outer surface and an inner surface in relation to said cushion, wherein a film is laminated to at least one of said outer surface and said inner surface of said fabric, wherein said film is present on said surface of said fabric in an amount of it least 0.8 and at most 2.7 ounces per square yard of the fabric, wherein said film provides a substantially uniform laminated film layer on said surface of said fabric; and wherein said airbag cushion exhibits a characteristic leak-down time after inflation of at least 5 seconds.

The Examiner relies upon the following references in rejecting the subject matter on appeal:

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|---|---|---|
| Breed | 5,863,068 | Jan. 26, 1999 |
| Moriwaki | 5,989,660 | Nov. 23, 1999 |
| Veiga | 6,239,046 B1 | May 29, 2001 |

THE REJECTIONS

Claims 1-3, 8-11, 16 and 17 stand rejected under 35 U.S.C. § 102(e) as anticipated by, or in the alternative, under 35 U.S.C. §103(a) as obvious over Veiga.

Claims 1-17 stand rejected under 35 U.S.C. § 102(b) as anticipated by, or in the alternative, under 35 U.S.C. §103(a) as obvious over Moriwaki.

Claims 1-17 stand rejected under 35 U.S.C. §103(a) as obvious over the combination of Breed and Moriwaki.

## OPINION[2]

*The Anticipation and Obviousness Rejection over Veiga*

Did the Examiner err in finding that Veiga discloses a side curtain airbag cushioned comprising a fabric having a film layer on the outer surface or inner surface of the fabric as required by independent claims 1 and 10? We answer this question in the negative. Therefore, we AFFIRM.

Appellants have not presented separate arguments for all of the rejected claims. Rather, Appellants' arguments are principally directed to independent claims 1 and 10. Any claim not separately argued will stand or fall with independent claims 1 and 10. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2009).

Appellants argue that the claimed invention is not taught by Veiga and is not inherent to the construction of Veiga. (App. Br. 5). Appellants argue that the polyurethane layer of Veiga is applied as a coating across a porous fabric in a wet state and, therefore, would not be a substantially uniform laminated film layer as required by the claimed invention. (App. Br. 6). Appellants argue that the Examiner's inherency determination is erroneous because the structure of Veiga is not the same as the claimed invention. (App. Br. 6-7). Regarding claim 10, Appellants rely on similar arguments regarding the Examiner's inherency determination. Specifically, Appellants

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[2] We note that the Examiner's Answer, dated October 2, 2007, does not include page number. We will reference the Answer sequentially utilizing the page entitled "BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES" as page 1.

contend the polyurethane layer of Veiga is not the same as the claimed film layer to the method of application. (App. Br. 7-8).

The Examiner found that Veiga discloses a woven fabric coated with a plurality of polymeric layers suitable for use as a side curtain airbag cushioned. (Ans. 3). The Examiner found that Veiga discloses a woven fabric coated with a polyurethane layer and thereafter coated with a polysiloxane elastomeric layer. (Ans. 3; Veiga, col. 1, ll. 50-55). The Examiner found that Veiga discloses the polyurethane coating weight applied is about 0.3 to about 1.5 ounces per square yard layer. (Ans. 3; Veiga, col. 2, ll. 57-59). The Examiner recognizes that Veiga does not explicitly describe the airbag cushion as having a leak-down time after inflation of at least 5 seconds (claims 1 and 10) or the film layer properties described in claim 10. (Ans. 4). The Examiner reasons that these properties were inherent to the film layer and airbag cushioned formed by Veiga due to the similarity of the materials used to form the film layer and airbag cushion. (Ans. 4).

We do not find Appellants' arguments persuasive of error in the Examiner's rejection. Veiga discloses the prime coat (polyurethane) layer completely covers the entire surface of the nonwoven fabric and the coated layer is dry in the oven at elevated temperatures. (Veiga, col. 2, ll. 60-68). Veiga describes the structure formed as a laminate or composite. Specifically Veiga, states: "[t]he laminated or composite structure depicted in FIG. 1 typically forms a panel of an air bag or air curtain after die cutting into the desired configuration by the air bag manufacturer." (*id.* at col. 3, ll. 18-21).

Due to the structural similarity the claimed airbag cushion and Veiga's airbag cushion, the Examiner has a reasonable basis for believing that Veiga's airbag cushion comprising a fabric having a film layer attached thereon would inherently possess the characteristics of claims 1 and 10. Appellants have not provided evidence establishing that the method of forming the polyurethane film layer of Veiga produces a film layer and airbag cushion that do not possess the claimed characteristics. "[W]hen the PTO shows sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." *In re Spada*, 911 F.2d 705, 708 (Fed. Cir. 1990) (citing *In re King,* 801 F.2d 1324, 1327 (Fed. Cir. 1986); *In re Ludtke,* 441 F.2d 660, 664 (CCPA 1971).

> "[T]he PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his claimed product. . . . Whether the rejection is based on 'inherency' under 35 U.S.C. s [sic] 102, on 'prima facie obviousness' under 35 U.S.C. s [sic] 103, jointly or alternatively, the burden of proof is the same . . . (footnote omitted)."

*In re Fitzgerald*, 619 F.2d 67, 70 (CCPA 1980) (quoting *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977)).

Accordingly, based on the totality of the record, including due consideration of Appellants' arguments, we hold that the preponderance of evidence does not establish error in the Examiner's rejection.

*The Anticipation and Obviousness Rejection over Moriwaki*

Did the Examiner err in finding that Moriwaki discloses a side curtain airbag cushion comprising a fabric having a film layer on the outer surface

or inner surface of the fabric as required by independent claims 1 and 10? We answer this question in the negative. Therefore, we AFFIRM.

Appellants argue the claimed invention is not taught Moriwaki and is not inherent to the construction of Moriwaki. (App. Br. 9). Appellants argue that the polyurethane layer of Moriwaki is applied as a coating across a porous fabric such that intricacies between the fibers are filled with the resident and, therefore, would not be a substantially uniform laminated film layer as required by the claimed invention. (App. Br. 9-10). Appellants argue that the Examiner's inherency determination is erroneous because the structure of Moriwaki is not the same as the claimed invention. (App. Br. 10). Regarding claim 10, Appellants rely on similar arguments regarding the Examiner's inherency determination. Specifically, Appellants contend the polyurethane layer of Moriwaki is not the same as the claimed film layer do to the method of application. (App. Br. 11).

The Examiner found that Moriwaki discloses a fibrous substrate coated with a thermoplastic layer suitable for use as a side curtain airbag cushioned. (Ans. 4-5). The Examiner found that Moriwaki discloses a polyurethane layer was suitable for coating the fibrous substrate. (Ans. 5; col. 3, ll. 20-25). The Examiner found that Moriwaki discloses the polyurethane layer formed on the fibrous substrate was 10μ or less and would meet the claimed film thickness. (Ans. 5). The Examiner recognizes that Moriwaki did not explicitly describe the airbag cushion as having a leak-down time after inflation of at least 5 seconds (claims 1 and 10) or the film layer properties described in claim 10. The Examiner reasons that these properties were inherent to the film layer and airbag cushion formed by

Moriwaki due to the similarity of the materials used to form the film layer and airbag cushion. (Ans. 5).

We do not find Appellants' arguments persuasive of error in the Examiner's rejection. Moriwaki discloses the object of the invention is to produce an airbag that has low air permeability. Moriwaki discloses the polymer layer is applied to the fibrous substrate so that the intricacies between the fibrous are filled to ensure a reinforced covering layer is formed. (Moriwaki, col. 3, ll. 53-64). Moriwaki discloses that advantages of the structure formed includes keeping the air permeability within in the range preferable for usage as an airbag cushions. (*Id.* at col. 4, ll. 38-65). Appellants have not provided evidence establishing that the method of forming the polyurethane film layer of Moriwaki produces a film layer and airbag cushion that do not possess the claimed characteristics.

As set forth above, due to the structural similarity between the claimed airbag cushion and the airbag cushion of Moriwaki, the Examiner has a reasonable basis for believing that Moriwaki's airbag cushion comprising a fabric having a film layer attached thereon would possess the characteristics of claims 1 and 10. Appellants have not identified sufficient evidence to establish a distinction between the claimed characteristics and Moriwaki's airbag cushion and film layer. *In re Spada*,

Since we affirm the rejection over Moriwaki alone, we also affirm the rejection of claims 1-17 over the combination of Breed and Moriwaki.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(v).

AFFIRMED

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WILLIAM S PARKS
MILLIKEN & COMPANY
P O BOX 1927 (M-495)
920 MILLIKEN ROAD
SPARTANBURG, SC 29304